Ontario

A BRIEF
TO THE
ATTORNEY-GENERAL OF ONTARIO
RESPECTING
THE FAMILY LAW REFORM ACT

Ontario Status of Women Council
March 1983

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INTRODUCTION

On December 6th, 1982, judgment was pronounced in Leatherdale v. Leatherdale, the first case under the Family Law Reform Act of Ontario to reach the Supreme Court of Canada.

Mr. and Mrs. Leatherdale were married in 1959 and separated in 1978. Mrs. Leatherdale worked outside the home for approximately nine years during this period. The rest of the time she was at home, caring for a child and managing the household. Over the nineteen year period, Mr. Leatherdale saved approximately $40,000 of Bell Canada shares and $10,000 in a registered retirement savings plan. Mrs. Leatherdale had received an inheritance of $14,000 and Mr. Leatherdale had received one of $7,500.00. Mrs. Leatherdale had used $4,000 of her inheritance and Mr. Leatherdale had used all of his inheritance for family purposes. The remaining $10,000 of Mrs. Leatherdale's inheritance had gone into her private savings.

After Mr. and Mrs. Leatherdale separated in 1978, they agreed to share their family assets equally; but they disagreed as to the fate of the Bell Canada shares and the registered retirement savings plan, both registered in Mr. Leatherdale's name. Mrs. Leatherdale applied for an equal division of these assets on the following grounds:

a. They were family assets in that they were intended for the joint use of the couple in their old age.

b. Even if these assets were non-family assets, it was inequitable in all the circumstances if Mrs. Leatherdale received only one-half of the family assets - her assumption of responsibility in the home had assisted her husband in the acquisition of the shares and R.R.S.P.

c. If the disputed assets were non-family assets, the contribution of Mrs. Leatherdale to their acquisition by her work both in and outside of the home entitled her to compensation.

Mr. Justice Holland, the trial judge, awarded Mrs. Leatherdale $20,000 under section 8 of the Family Law Reform Act on the basis that she had contributed work, money or money's worth to the acquisition of the assets by her husband.[1]

The Court of Appeal reversed this decision and gave Mrs. Leatherdale no interest whatsoever in the assets. It did so on the basis of the following conclusions:

a. the assets were not family assets and therefore were not divisible under section 4(1) of the Act;

b. an equal division of the family assets led to no inequity that required redressing through some division of non-family assets under section 4(6); and

c. Mrs. Leatherdale had not made the direct contribution of work, money or money's worth to the acquisition of the assets that was required for compensation to be awarded under section 8.[2]

The Supreme Court of Canada disagreed in part with both the trial court and the Court of Appeal. It concluded that Mrs. Leatherdale had contributed money or money's worth to the acquisition of the shares and the registered retirement savings plan while she had been working outside the home and pooling income with her husband, but that she had not been making a similar contribution in the form of work or money's worth when she was working in the home. As a result, she was given an award of $10,000 under section 8 of the Family Law Reform Act to compensate her for her interest in the assets.

The Chief Justice, Bora Laskin, in rendering the majority decision, adopted the following words of Mr. Justice Arnup in the case of Page v. Page:[3]

> "...a wife is not entitled to an award under s. 8 simply because she has been a zealous wife and mother, freeing the husband for the pursuit of great income and assets which may become non-family assets."

The learned Chief Justice went on to say:

> "It is clear that the trial judge went too far in attributing work in the home to the acquisition of non-family assets under s. 8... The trial judge was, as stated above, wrong in

> bringing into account the work of the wife in the home. However, the contribution reflected in the wife's earnings as a bank employee were certainly part of the pooling arrangement between the spouses. As the trial judge observed in a finding that was not contested, during the period of cohabitation the efforts of the parties were truly as a team... Although I must leave out, as I have said, any contribution of work in the home, the work in the bank was a calculable element to a limited extent."[4]

The Leatherdale Case stands for the following propositions:

a. Whether or not the division of family assets between spouses under section 4 of the Family Law Reform Act results in any inequity depends not on whether the spouses are rewarded in the same way for their respective contributions to the welfare of the family, but more on whether the spouses end up in similar capital positions.

b. A person's labour in the market place has value that will be recognized under section 8 of the Family Law Reform Act, but a person's labour in the home has no recognizable value. This will be so, even though the work done by the person in the home would cost money if done by a third party; and more importantly, this will be so, even though the work done in the home is of obvious benefit to the family as a whole.

Just as the Murdoch Case[5] in 1975 acted as an incentive for people to assess the matrimonial property laws that were in effect at that time, so now the Leatherdale Case forces us to question the adequacy of Part I of the Family Law Reform Act. On December 10th, 1982, the President of the Ontario Status of Women Council wrote to the Honourable R. Roy McMurtry, Attorney General of Ontario, expressing the concern of the Council as to the treatment of housewives under the Family Law Reform Act. On December 21st, 1982, the Attorney General indicated in the Legislature that his Ministry was undergoing a thorough review of this legislation and would welcome input from interested persons and organizations. Then on January 4th, 1983, Mr. McMurtry sent a specific request to the Council for any appropriate submissions concerning family law reform.

The Ontario Status of Women Council is encouraged by the fact that the Attorney General was so quick to respond to the serious issues raised by the Leatherdale Case. The Council is also very pleased that the Ministry of the Attorney General is undertaking an extensive review of the Family Law Reform Act, barely five years after this legislation was passed. This interest in keeping our laws relevant to the current needs of our society is highly commendable.

In response to Mr. McMurtry's invitation for comments, the Council first consulted with several concerned groups and with a number of experts in family law, all of

whom were most co-operative and informative in offering their suggestions for family law reform. The Council went on to study various options relating to specific problem areas before it finally arrived at the recommendations it is now pleased to present to the Attorney General.

In making its recommendations, however, the Council is mindful of how sensitive and complex are the family law issues that must be addressed in the Family Law Reform Act. Furthermore, the Council acknowledges that the process of law reform in an area so filled with moral and emotional overtones is an extremely difficult one.

PREVIOUS BRIEFS SUBMITTED BY THE ONTARIO STATUS OF WOMEN COUNCIL REGARDING FAMILY LAW MATTERS

Since its establishment in September, 1973, the Ontario Status of Women Council has devoted much of its energy to family law reform in Ontario. In October, 1974, the Council sponsored a three-day Fair Share Conference at which 500 women examined the Ontario Law Reform Commission Report on Property Law. Recommendations from this conference were later submitted to the Attorney General.

In 1975 the Council supported the principles set out in the Ontario Law Reform Commission Report on Support Obligations and in the Report on Maintenance on Divorce of the Law Reform Commission of Canada.

In December, 1976, the Council submitted a brief to the Justice Committee of the Ontario Legislature regarding Bill 140 - the forerunner of the Family Law Reform Act. Then in January, 1978, the Council submitted a further brief to the Justice Committee regarding Bill 59. Finally, in the spring of 1978, the Council made a number of statements regarding the new Family Law Reform Act.

In September, 1980, the Council submitted a brief to the Attorney General regarding the rights of surviving spouses to family property. As mentioned above, the Council more recently has watched with interest the progress of the Leatherdale Case through the court system and has commented on the significance of this decision for housewives in Ontario.

The Council's position on various issues discussed above are repeated in this brief, subject to any modifications the Council feels are necessary to meet present realities. In this regard, this brief is seen by the Council as a consolidation and extension of the many recommendations it has made in the past concerning family law reform.

BASIC PRINCIPLES IN THE AREA OF FAMILY LAW

As we reassess family law in our province, the Council feels it is of the utmost importance that the principles applicable in this area of the law be clearly articulated. Throughout this brief, the Council will focus on these principles rather than on the mechanics by which the principles are to be realized. The Council believes that as long as there is a general acceptance of the basic principles that are to be applied in family law matters, the Ministry of the Attorney General - after careful consideration of various alternatives - can best determine the means by which those principles can be translated into practice.

The three basic principles that the Council believes must be recognized in Ontario's family laws are as follows:

a. Marriage is a full partnership of equals, regardless of the functions that each partner performs within the marriage. Upon the termination of the partnership (for whatever reason), the resources created by the partnership should be divided equally between the individual partners.

b. There is no right or wrong way for a family to divide various responsibilities among its members. Each family in our society should be free to arrange its lifestyle in whatever way seems appropriate to the members of that family. If in the future the marital relationship breaks down, no member of the family should be singled out for penalty because of the division of labour chosen. The economic repercussions of the choice should continue to be dealt with and borne by the family as a unit.

c. The best interests of the children in the family should take precedence over the interests of either parent - not only for custody and access matters, but also for property and support issues.

PROPERTY ISSUES

A. CHOICE OF A MATRIMONIAL PROPERTY REGIME

The Ontario Status of Women Council believes that the guiding principle in the choice of a matrimonial property regime must be that marriage is a full economic partnership which should result in both partners gaining equal benefits from the work done within the partnership.

As is pointed out in section 4(5) of the Family Law Reform Act, there are at least two functions which must be performed in all marriages: household management and financial provision for the family. In many other marriages, there is a third function: child care. A separate property regime, with no superimposed rules regarding the sharing of assets, would be quite workable if, in the majority of marriages each partner assumed half of the responsibility for each of these marital functions.

What exists in our modern society, however, is a wide variety of arrangements between spouses regarding the division of labour within the family. There are still many marriages in which the wife stays home to care for children and manage the household and the husband is the sole financial provider. In other marriages, the wife works on a part-time or intermittent basis outside the home, but still assumes prime responsibility for child care arrangements and household management while the husband acts as principal financial provider. More commonly in

recent years, both spouses are trying to maintain full-time careers and raise children at the same time. In this arrangement, both make significant financial contributions to the family and both share to some degree the responsibility for the home and the children.

To repeat a basic principle stated earlier, there is no right or wrong way for a family to divide the various responsibilities among its members. Each family in our society should be free to arrange its lifestyle in whatever way seems appropriate to the members of that family. If in the future the marital relationship breaks down, no member of the family should be singled out for penalty for the division of labour chosen by the family when it was operating as a unit.

The Council reviewed a number of options before deciding what matrimonial property regime it considered most appropriate for Ontario spouses.

1. Separate Property Regime

A simple separate property regime was what was in existence prior to the passage of Part I of the Family Law Reform Act. The inequities produced by this system have been well-documented in other studies,[6] and the Council sees no reason to review them in this brief. Suffice it to say that the Council rejected this option for the same reasons it was discarded by the Ontario Law Reform Commission, the Ministry of the Attorney General and the Ontario legislature.

2. Separate Property Regime Combined with the Family Assets Doctrine and Judicial Discretion (i.e. Part I of the Family Law Reform Act)

The Council recognizes that Part I of the Family Law Reform Act was a very significant step forward in the process of reform of the matrimonial property laws in Ontario. It also acknowledges that the provisions in Part I for the division of assets are adequate in many family situations. There are other cases, however, where the family assets doctrine produces results which are inconsistent with the first two basic principles stated earlier in this brief.

To be more explicit:

a. An artificial distinction is created between family and non-family assets. Greater protection is afforded a non-income-earning spouse in a family where family assets are acquired than is provided where non-family assets are acquired. Furthermore, assets can be manipulated by their legal owner so as to defeat the interests of the non-owner spouse.

b. The distinction between family and non-family assets is based on actual use or enjoyment rather than actual or intended use or enjoyment; and therefore many assets which families themselves consider family assets (such as R.R.S.P.'s, R.H.O.S.P.'s, etc.) are labelled non-family assets by the legislation.

c. The legislation provides a minimum standard of sharing and then allows for greater sharing only on the basis of judicial discretion. The onus is on the person seeking greater sharing to pursuade the court it would be inequitable if the greater sharing was not granted.

d. Judicial discretion plays a major role under the Family Law Reform Act; this results in a lack of predictability in the law and therefore greater litigation. It also makes the rights of a spouse dependent in part on the individual value system of the judge hearing that spouse's case.

e. Some courts have set up the requirement that all possible remedies under section 4(4) have to be exhausted before section 4(6) can be considered.

f. Section 4(6) of the legislation, which could have been used by the courts to give both spouses economic recognition for the various responsibilities they assumed during the marriage, has been given a very restrictive interpretation by the Ontario Court of Appeal.

g. Section 8 of the legislation, which could also have been used by the courts to give both spouses economic recognition for the various responsibilities they assumed during the marriage, has been interpreted by the Supreme Court of Canada to be of some use if the applicant spouse works outside the home, but of no application if he or she works in the home.

h. The legislation does not differentiate between assets acquired through the joint efforts of the spouses during the period of the marital partnership and assets acquired either outside the period of the marital partnership or as a result of factors completely extraneous to the partnership.

i. The legislation provides for a limited sharing of assets after marriage breakdown, but does not provide for any sharing on the death of a spouse.

j. The legislation offers no guidelines as to the treatment of family debts.

As a result of these problems, the Council believes Part I of the Family Law Reform Act is inadequate to meet the needs of Ontario families.

3. Full Community of Property Regime

At a theoretical level, a "full community of property regime" is appealing because it accepts the reality of spouses contributing in different but equal ways to the welfare of the family, entitling each of them to share equally in the gains (and losses) resulting from their joint efforts. Under such a regime, although each spouse retains control over certain property owned by that spouse at the time of the marriage, other items of property acquired before marriage and all property acquired during the marriage are considered joint property right from the date of the marriage.

An analysis by the Ontario Law Reform Commission[7] of various community systems that have existed in western nations raised questions, however, as to the appropriateness of these systems for Ontario families:

a. "A substantial part of the property of the spouses will fall into the community as from the date of the marriage. Both spouses have rights in the community, but the husband normally, either in law or in fact, will have the administration and control of it."[8] The husband in these situations should administer the community property in the best interests of both spouses; however, if he does not, the safeguards that may be built into such a system to protect the wife may not be adequate.

b. If one spouse is engaged in business, the efficient operation of that business can be affected by the marital relationship and its creation of a community of property.

c. In most community regimes, the personal property of each spouse owned at the time of the marriage, falls into the community of property. This can result in inequities in marriages of short duration or in second marriages later in life.

d. "The system tends to be complicated due to the distinction between separate and community property; to the allocation and apportionment of debts; and controls on transactions."[9]

The Council, on the basis of these conclusions of the Ontario Law Reform Commission, rejected a full community of property regime as a viable option for Ontario.

4. Deferred Community of Property Regime (Partnership of Acquests)

The Ontario Law Reform Commission in its report on Family Property Law[10] stated as follows:

> "Those jurisdictions that do not have community of property but which nevertheless manage to avoid the disadvantages for married persons of the regime of strict separation of property are, without question, the best models for the creation of a new system of matrimonial property law in Ontario..."

Then in referring to a partnership of acquests system, the Commission added:

> "This law provides, essentially, for separation of property during marriage and equal sharing upon death, divorce, or change in matrimonial regime, of property acquired after marriage. It combines the best features of the systems of separation of property and community property without attracting the disadvantages of either. In other words, these new approaches to the economic aspects of the marriage relationship combine those features of the separate property system that conduce to maximum autonomy on the part of each spouse during the currency of the marriage with an assured potential for mutuality of participation in its material assets, thereby allowing a degree of equality that is unattainable under present Ontario law."[11]

In its Second Annual Report (October 1974 to April 1976), the Ontario Status of Women Council initially rejected the deferred community of property system proposed by the Ontario Law Reform Commission and instead opted for property division between spouses according to judicial guidelines. The Council, at the time, was worried that rigid sharing rules would be too inflexible to be just. It therefore recommended that matrimonial property legislation set out guidelines for the courts to follow in dividing property between spouses but that a significant amount of judicial discretion be left with the courts to enable them to do what was just in the circumstances of each case.

Part I of the Family Law Reform Act, insofar as it combined legislative guidelines with judicial discretion, was structured much as the Council recommended. The law in

this form, however, has not been implemented as the Council would have wished. Instead, the presence of so much judicial discretion has resulted in the following problems:

a. There does not appear to be a general consensus among judges as to what result is fair or equitable in a given set of circumstances. This lack of consensus produces uncertainty and unpredictability in the law. This in turn results in litigation.

b. If any trend can be identified in the application of the judicial guidelines in Part I of the Act, it is that the work of a parent or homemaker is not of value in the acquisition of non-family assets by the other spouse.

The Council, keeping in mind that its mandate is to advise the Government of Ontario on matters pertaining to the status of women, has concluded that a matrimonial property system allowing significant judicial discretion, does not adequately serve the needs of Ontario women. With the diverse family arrangements that exist in our society, the Council feels that a deferred community of property regime, coupled with co-ownership of the matrimonial home and with the possibility of some judicial discretion in regard to business assets and debts, would best meet the needs of the majority of Ontario families.

In effect, the Council is now looking back to the recommendations made by the Ontario Law Reform Commission in its Report on Family Property Law for guidance as to the direction family law reform should take in Ontario.

B. PROPERTY TO BE INCLUDED IN THE DEFERRED COMMUNITY

The Council now recommends that a deferred community of property regime be introduced in Ontario for those couples who choose not to have a marriage contract establishing their own rules for ownership and division of property.

Just as was recommended by the Ontario Law Reform Commission, the Council would include in the community property to be shared at the termination of the marital partnership, those assets acquired by the spouses during the operation of the partnership and the increase in value over the lifetime of the partnership of any assets owned by either spouse at the time of marriage. This would mean that the value of property owned by either spouse at the time of the marriage would not be shared with the other spouse by virtue of the marriage. Furthermore, the value of property acquired by either spouse following the separation of the spouses would not be shared.

The Council adopts the procedure recommended by the Law Reform Commission that property rights be adjusted at the termination of the community of property by payment of an equalizing claim by one spouse to the other.

The equalizing claim would be calculated by comparing the net worth of a spouse at the time of the marriage to the net worth of the spouse at the breakdown of the marital partnership. The spouse whose net worth had increased by the greater amount over the currency of the

partnership would pay the equalizing claim to the other so that they both share equally their combined increase in net worth over the life of the partnership.

Inherent in the concept of "net worth" is the acceptance that the value of outstanding debts may offset the value of owned assets. To the extent that obtaining credit for everything from one's house, car and furnishings to one's entertainment and vacations and even to one's medical services has become an acceptable way of life for many people in our province, it is essential that our matrimonial property laws deal specifically with debts as well as assets. Part I of the Family Law Reform Act does not mention debts; as a result, there has not been any consistent treatment of debts in the overall sorting out of a couple's property rights following marriage breakdown. The deferred community system now being recommended would focus attention on this topic.

The Council acknowledges that the question of how debts are to be treated in a deferred community system is extremely complex; a full analysis of the various options possible is beyond the scope of this brief. At this time, the Council is able to say only that the value of any outstanding debts of a spouse at the time of marriage should affect the net worth of the spouse at that time for the purpose of calculating the equalizing claim at a later date. Similarly, the value of the outstanding debts of a

spouse at the time of marriage breakdown should be taken into account in determining the net worth of the spouse at that time, with the significant proviso that those debts not be used to turn the net worth of that spouse into a negative figure.

In recognition of the special problems presented by debts, the Council also suggests that a limited amount of judicial discretion be permitted to ensure their equitable treatment at the termination of the marital partnership. This is described in more detail below.

Again in conformity with the recommendations of the Ontario Law Reform Commission, the Council would exempt from sharing any assets acquired by either spouse by way of gift, inheritance, trust or settlement, even if acquired by the spouse during the currency of the marital relationship. Similarly, any award or settlement of tort damages or any proceeds from an insurance policy (not in respect of a property right) would be exempted from sharing, even if acquired during marriage. Aside from these exemptions, however, the Council would have all other property either spouse acquired from the date of the marriage to the date of separation shared equally between the spouses upon the termination of the community. This is recommended whether the assets of the spouses are in the form of family assets (as defined in the present Family Law Reform Act) or in the form of pensions, registered retirement savings plans, stocks, bonds, businesses, personal effects or whatever else.

In the opinion of the Council, it is only through this type of sharing that the principle that marriage is a full partnership of equals can be put into effect.

The advantages of this type of system over the present system are numerous:

a. The sharing contemplated is more likely to be seen by spouses as being fair than is the sharing now provided in the Family Law Reform Act:

   i. the sharing relates only to the products of the joint labour of the spouses;

   ii. the sharing applies to all of the assets produced through this joint labour - not just those identified as family assets.

b. The purpose of the matrimonial property laws will not be defeated through the manipulation of assets (such as can be done through investments in non-family assets).

c. The rules are definite and the results therefore more predictable. This should result in less litigation.

d. There is no need for judicial discretion to take into account the following variables:

   i. the duration of the period of cohabitation under the marriage;

ii. the duration of the period during which the spouses have lived separate and apart;

iii. the date when the property was acquired;

iv. the extent to which property was acquired by one spouse by inheritance or gift.

These factors have already been addressed in the general rule with a deferred community system.

e. There is no need to conduct a post-mortem on the marital relationship to determine who did what during the marriage and how the roles assumed by each spouse in the marriage affected the ability of the other spouse to acquire property interests.

The Council recognizes that there are significant difficulties involved in the implementation of a deferred community system, and it realizes that it was largely as a result of these practical difficulties that a deferred community regime was not chosen in 1978. Some of the problems it contemplates are as follows:

a. All spouses would have to maintain records of their assets and debts at the time of the marriage if they later wanted to have property owned at the time of the marriage exempted from any potential sharing.

b. For spouses with significant assets at the time of marriage, costly appraisals may be required.

c. The calculation to be done to terminate the community could be complicated or difficult for some spouses to do on their own.

d. The issue of how the value of the exempted property will be calculated as of the termination of the community is a difficult one and requires special study.

e. It may be that other laws will have to be modified to allow the existence of a deferred community system. For example, if the only asset acquired over the course of a marriage is a pension fund in the name of one spouse, it may be necessary for pension laws to be altered so as to allow the division of pension credits.

Despite these factors, the Council is convinced that a deferred community of property regime can work in Ontario. It is encouraged in this regard by the initiatives that have been taken in the last few years in Manitoba, Saskatchewan and Alberta. All of these provinces now have deferrred community systems, similar to the one Council is now recommending. The experience of these provinces and of many other western nations with this type of regime should be of assistance to Ontario in working through some of the problems referred to above.

C. JUDICIAL DISCRETION

After very careful consideration, the Council has concluded that a limited amount of judicial discretion should be maintained in Ontario's matrimonial property regime. This judicial discretion would be confined to two specific issues: business assets and debts.

1. Business Assets

The Council feels strongly that as a general rule, business assets developed during the marital partnership must be included with all other assets in the marital community of property. It is artificial to distinguish between a business and any other form of investment. A family that puts all excess resources into a business is really doing the same thing as a family putting its resources into a home or into savings or pensions. Both families are providing for the family's future security.

What worries the Council, however, is that there may be certain situations where it would not be in the best interests of the family as a whole if the value of all or part of the business assets owned by one spouse was included in the net worth of that spouse for the purpose of calculating the equalizing claim. The result of the inclusion of the business asset might be that the business would have to be sold or discontinued if the equalizing claim was to be paid. This might destroy the income-producing ability of one of the spouses to the detriment

not only of that spouse but of the whole family. Of special concern to the Council are family businesses and family farms that provide a livelihood for all members of the family and that often the family wants to see passed on from generation to generation.

While expressing concern about these assets, however, the Council is not suggesting that the non-titled spouse (usually the wife) should bear the full economic burden if the business is to be maintained. As a family member, she is equally entitled to a realization of the fruits of her labour as are all other members of the family.

What the Council proposes is as follows:

a. The general rule would be that business assets acquired during the marital partnership would fall into the community property to be divided upon the termination of the partnership.

b. If the owner spouse wanted to exclude the value of all or part of the business assets from his (or her) net worth, the onus would be on that spouse to persuade the court that the business assets should be excluded from the community.

c. The test would be an onerous one - the court could exclude the value of all or part of the business assets only if it thought it would

be grossly unfair or unconscionable because of extraordinary circumstances for the business asset to be included in the community property and shared equally.

d. The court would have the further discretion to determine how that part of any equalizing claim relating to business assets would be payable. In exercising this discretion, the court would be directed to consider how the best interests of the family and the best interests of the business could be served.

2. Debts

In deciding that one spouse's outstanding debts at the time of the termination of the marital partnership should be shared by the other spouse, the Council had some concerns that this rule might not always be seen as fair. There are likely to be some cases where the application of this rule would result in one spouse being seriously prejudiced as a result of the gross irresponsibility of the other spouse. The example that comes to mind is where one spouse unilaterally incurs a large debt, not to finance the purchase of an asset but rather to squander through gambling, "high living" or excessive drinking. In these circumstances, it would not seem fair to force a frugal and conscientious spouse to share the liability with the irresponsible spouse.

To cover what the Council believes are rather exceptional circumstances, it is recommended that courts have the discretion not to include some or all of a spouse's outstanding debts in the calculation of the net worth of that spouse at the time of the termination of the marital partnership if it would be grossly unfair or unconscionable because of extraordinary circumstances. The onus to establish the exceptional circumstances warranting the exercise of judicial discretion would be on the spouse seeking to alter the general rule that debts incurred during the marital partnership are to be shared.

In addition, the Council can foresee certain situations where it would be fair if the net worth of one of the spouses was able to be a negative figure. If one spouse has incurred a debt strictly for family purposes and the presence of that debt would technically bring that spouse's net worth below zero, the court should have the additional discretion of taking into account in the calculation of the equalizing claim debts that normally would not be considered. The onus of proving that the exercise of judicial discretion in these circumstances is warranted would be on the spouse wanting his or her net worth to be a negative amount. The test would be: Is it grossly unfair or unconscionable because of extraordinary circumstances not to share the debt in question?

D. TERMINATION OF THE MARITAL PARTNERSHIP

With a deferred community of property regime, the question arises as to when the property regime can be terminated. In accordance with the proposals of the Ontario Law Reform Commission,[12] the Council recommends that termination be possible by court application or by the death of a spouse.

1. Court Application

Either spouse could apply for the termination of the deferred community of property regime in one or more of the following situations:

a. in divorce proceedings under the Divorce Act;

b. in proceedings for a declaration of nullity;

c. when the spouses are living separate and apart and there is no reasonable prospect of the resumption of cohabitation;

d. when one spouse fears that his or her legitimate expectations in the shareable value of assets have been or will be jeopardized; or

e. when a spouse deals with a matrimonial home without the consent of the applicant spouse or without a court order dispensing with that consent.

In regard to the third alternative above, the Council would like to see a change in the way the phrase "living separate and apart under the same roof" is interpreted by the courts.

Under the present law, spouses are not supposed to eat together, go out socially together, do various chores for each other around the house or sleep together if they want to be considered "separate and apart under the same roof". In other words, the law expects them to establish two isolated camps within the same household.

This is not only difficult for a couple to do considering the realities of family life, but it also discourages reconciliation and encourages family discord. Where children are concerned, the stresses created by the cold war atmosphere in the home do little to foster a healthy readjustment to the separation and certainly the best interests of the children are not served.

In the opinion of the Council, in order for a couple to be "living separate and apart" it should be sufficient for one spouse to establish that he or she wants to separate and that this message has been communicated to the other spouse. This would allow spouses who have decided to separate the opportunity of sharing accommodation over a transition period - if that is what they want to do - without having to mold their family into two separate households. Two types of couples who would benefit

from the change are first, those, who for economic reasons, would have difficulty physically separating, and second, those with ambivalent feelings about the separation.

The Council also recommends that it be possible for a joint application of the spouses to be brought where they wish to terminate the deferred community of property regime by signing a marriage contract or separation agreement, but are having difficulty working out all aspects of the property division.

2. Death of a Spouse

In August, 1980, the Ontario Status of Women Council presented a brief to the Government of Ontario respecting the Rights of Widowed Persons to Family Property. A short summary of the contents of that brief will be presented here.

Part I of the Family Law Reform Act in regard to the division of family and non-family assets under section 4 cannot be invoked by one spouse after the death of the other spouse. The only type of application that can be made under Part I of the Act after the death of a spouse is a claim against the estate of the deceased spouse under section 8. Such a claim would be for compensation or an interest in property based on the contributions the surviving spouse has made, in the form of work, money or money's worth, in respect to the acquisition, management, maintenance, operation or improvement of the non-family assets of the deceased spouse.

In practical terms, this means that the spouse who has all of the assets of the family registered in his or her name can disinherit the other spouse by providing in a will that the assets are to go to a third party. If a deceased spouse did that, the only options available to the surviving spouse are as follows:

a. bring an application under section 8 of the Family Law Reform Act for an interest in the non-family assets of the deceased spouse on the basis of some form of contribution to those assets;

b. bring an application for support under the Succession Law Reform Act of Ontario.

With either option, the surviving spouse has to apply to the courts for help. If the major assets of the deceased spouse were family assets, section 8 is of no use. If the surviving spouse is self-supporting or has the potential of being self-supporting, the Succession Law Reform Act may not be helpful.

At the theoretical level, the principles set out in the preamble to the Family Law Reform Act and the purpose of Part I of that legislation as set out in section 4(5) are not being respected. If marriage is a full partnership of equals, regardless of the functions that each partner performs within the marriage, then a surviving spouse as of right should have an interest in the property of the deceased spouse to the extent that this property reflects their joint labours.

As was stated in the 1980 brief:

> "...the principle remains. Spouses should be entitled as of right by their contribution to their marriage to share ownership of assets accumulated during marriage. They should not have to apply to a court. They should not have to prove "need". They should not have to beg for rights which belong to the divorced or separated persons, simply because their marriage broke down..."[13]

The Council in its brief recommended that the Family Law Reform Act's system of division of property should be available to widows and widowers so that assets are shared equitably on the death of a spouse. Alternatively, the Council recommended that as a basic minimum the surviving spouse be entitled to the same amount from the deceased's estate as if the deceased had died intestate (without a will).

The Attorney General, in response to the brief, indicated that at the time the Family Law Reform Act and Succession Law Reform Act were passed, the option of having Part I of the former act apply upon the death of a spouse was given serious consideration. It was apparently rejected as being too great an infringement on testamentary freedom, considering the small number of cases where it might be useful for a surviving spouse.

The Council's response to the Attorney General is two-fold:

a. It has no way of knowing how frequently surviving spouses are left with less in terms of property rights than they would have received had they separated and started an action under Part I of the Family Law Reform Act immediately before the death of the other spouse. Certainly it is fair to assume that the incidence of this is greater than case law will show. An application under the Succession Law Reform Act is a difficult and unpleasant application to bring and many spouses could prefer to endure inequity rather that publicize or cause friction within a family. To approach this point from another perspective, if so many spouses are already fairly treating the surviving spouses in their wills, what harm will be done if legislation recognizes the usual practice? In all likelihood those spouses who will be adversely affected are precisely those who would unfairly disinherit the surviving spouse.

b. The notion of testamentary freedom has been put on an artificial pedestal. If the property rights of a spouse are subject to legislation

> during his or her lifetime through the application of Part I of the Family Law Reform Act, surely the right of that spouse to control the property after death can be made equally subject to legislative intervention.

After further consideration of this issue in March 1982, the Council reaffirmed its support for the principle that surviving spouses should have the same property rights as divorced and separated spouses but recommended that as a start, the surviving spouse be given the option of taking what was provided for him or her under the will or of receiving what would be given under the rules of intestacy (assuming the spouse's preferential share was increased to $125,000.00). In addition, the spouse would have his or her rights under the Succession Law Reform Act.

Now that the Council has the opportunity of offering its recommendations for reform to various aspects of the Family Law Reform Act, the Council wishes to integrate its treatment of the rights of surviving spouses with the other ideas it is proposing in this brief.

First, the deferred community of property regime should be subject to termination upon the death of a spouse. At that time the equalizing claim would be calculated in the same way as it would be if the regime were terminated by court application. If the increase in net worth of the deceased from the time of the marriage to the date of death

was greater than the increase in net worth of the surviving spouse over the same period, an equalizing claim would be paid by the estate to the survivor. If, on the contrary, the survivor's increase in net worth was greater, no equalizing claim would be paid by the survivor to the estate.

The Council believes it is appropriate to give the surviving spouse this added advantage for the following reasons:

a. The surviving spouse should not have to alter his or her lifestyle to pay an equalizing claim to the estate. The survivor, without the help of the deceased may have a significant economic adjustment to make in any event.

b. The survivor may have dependent children to support.

c. In many situations, the will of the deceased may name the survivor as the major beneficiary. Payment of an equalizing claim to the estate could therefore be an unnecessary step in winding up the estate.

Second, the Council proposes that the surviving spouse always have the option of taking whatever is willed, in lieu of seeking an equalizing claim under the deferred community rules.

Third, the Council proposes that a surviving spouse be protected by having the matrimonial home (or, if there is more than one matrimonial home, the principal residence) held in joint tenancy so that on the death of the first spouse the survivor will become the sole owner of this important asset. This issue is dealt with in greater detail below.

With these protective provisions in place, the Council doubts that it will be necessary to provide the fourth alternative of allowing the surviving spouse to claim at least what that spouse would have received on an intestacy (or some increased amount, such as $125,000 as previously recommended).

Finally, the Council wants to emphasize how important it views this issue in the overall context of family law reform. It is joined in its concern by several of the family law experts and representatives of interested groups who made submissions to the Council prior to its preparation of this brief.

E. THE MATRIMONIAL HOME

The Council is of the view that the one asset not adequately dealt with in a deferred community system is the matrimonial home. In most families where the matrimonial home is owned by one or both of the spouses, the home is the single most important and valuable asset. Furthermore, it is the focal point of family life and the tangible item that gives family members a sense of identity and security. Because the matrimonial home is of such great importance to family members, their respective interests in the home both during cohabitation and in the event cohabitation ceases must be given special consideration.

1. Ownership Rights

The Council recommends that if a family has only one family residence in which one or both of the spouses have an ownership interest, the matrimonial home should be considered jointly owned by the spouses in equal shares as joint tenants. If at any point in time there is more than one family residence in which one or both of the spouses have an interest, then the matrimonial home which is the principal residence of the spouses should be considered jointly owned by the spouses in equal shares as joint tenants.

The following results flow from automatic co-ownership of the matrimonial home:

a. If the home is sold or mortgaged, both spouses are entitled to share equally the net proceeds from the transaction.

b. Upon the death of one spouse, the surviving spouse would be the sole owner of the home.

c. The spouses at all times would have joint control over the home. Both would have to consent to any sale, mortgage, lease, gift or other dealing with the property.

d. Creditors, dealing with one of the spouses after property in that spouse's name had become a matrimonial home, could not defeat the rights of the other spouse in the home through the registration of a writ of execution.

e. Upon marriage breakdown, each spouse would be entitled to an equal division of the value of the home.

There will no doubt be situations where both spouses agree that co-ownership of the matrimonial home is not appropriate in the circumstances of their family. It is quite common with second marriages that one spouse enters the relationship already owning a home, a home which had for several years previously been the family home of that spouse, his or her former spouse and their children. To make this home the joint property of the new spouses - regardless of the length of the second marriage or the equity acquired in the home during the second marriage - may be unacceptable to the owner spouse and "an act of treason"

in the eyes of the children from the first marriage. Recognizing that second marriages are likely to become more common in our society as the frequency of divorce increases, the Council believes that some flexibility must be built into the co-ownership rule to deal with these cases. It therefore suggests that couples be able to enter marriage contracts so as to contract out of the co-ownership principles, if they so wish. Couples already have this ability under Part IV of the Family Law Reform Act and therefore this recommendation would not require an amendment to the legislation.

The Council also believes that a couple should be able to decide in a marriage contract that their matrimonial home, for the purpose of the co-ownership rule, will be a family residence other than their principal residence.

2. Control of the Matrimonial Home

Section 42 of the Family Law Reform Act states that no property in Ontario that is a matrimonial home of a spouse will be disposed of or encumbered in any way unless both spouses consent to the transaction, the court authorizes the transaction, or one spouse has no further possessory rights in the property by virtue of a separation agreement.

The definition of matrimonial home in section 39 results in this protection applying to all family residences in Ontario in which either spouse has an interest.

Section 51(2) gives the added protection to spouses that they cannot in advance, through the signing of a marriage contract, release their right to joint control over a matrimonial home.

The Council agrees that there should be joint control by the spouses over all of their matrimonial homes (not just their current home or just their principal residence), and it feels that Part III of the Family Law Reform Act adequately expresses this principle. What concerns the Council however, is that the protective measures included in section 42 to ensure that this principle is respected, may not be adequate to meet the task at hand.

On December 24, 1982, Madame Justice Boland of the Supreme Court of Ontario released Reasons for Judgment in Stoimenov v. Stoimenov. In 1973, Mr. and Mrs. Stoimenov had purchased a family home in Rexdale and had placed title in their joint names. Later title was transferred to Mr. Stoimenov's name alone. In 1975, a cottage property was purchased near Parry Sound - in Mr. Stoimenov's name alone. In October, 1980, Mrs. Stoimenov and her three children fled the matrimonial home in Rexdale. They found temporary shelter in a transition house. On October 15th, 1982, Mrs. Stoimenov commenced a Family Law Reform Act application for, among other things, an equal division of family assets. Unbeknownst to her, Mr. Stoimenov had

already put mortgages worth $72,000.00 against title to the Rexdale home and a $50,000.00 mortgage against the summer cottage. He had sworn a false affidavit on the first saying the property was not a matrimonial home; and on the second, he had falsely sworn that he was not married. With the funds from the mortgages, as well as with funds obtained by selling the contents of both residences, Mr. Stoimenov absconded to Yugoslavia. Mrs. Stoimenov became aware of the situation only in November 1980.

At trial, Mrs. Stoimenov applied under sections 42(2) and 44(d) of the Family Law Reform Act, asking that the mortgages be set aside. Madame Justice Boland, referring to section 42, stated that the mortgagees were entitled to rely on the false affidavits of Mr. Stoimenov, unless they had received actual notice that the property in question was a matrimonial home. Her ladyship adopted the definition of actual notice given in Rose v. Peterkin:[14]

> "What such actual and direct notice is may well be ascertained very shortly by defining constructive notice, and then taking actual notice to be knowledge, not presumed as in the case of constructive notice, but shown to be actually brought home to the party to be charged with it, either by proof of his own admission or by the evidence of witnesses who are able to establish that the very fact, of which notice is to be established, not something which would have led to the discovery of the fact if an enquiry had been pursued, was brought to his knowledge."

The mortgagees or their agents had received the following notice concerning the status of the properties as matrimonial homes:

a. They had each received a credit report indicating Mr. Stoimenov was married.

b. The appraisers had seen a few puzzles and games at the properties.

c. The solicitor for the mortgagees on the Rexdale property knew through a search of title that Mr. Stoimenov was a married person in 1976 and that his spouse had been required to consent to a mortgage at that time.

d. The solicitor for the mortgagee on the Parry Sound property knew through previous involvement with Mr. Stoimenov that he was a married person in 1975.

Madame Justice Boland decided that the evidence did not establish the degree of express and direct knowledge on the part of the mortgagees, their solicitors or brokers which would have constituted actual notice that the properties were matrimonial homes. As a result, the interest of the mortgagees took precedence over the interest of Mrs. Stoimenov as a spouse.

Considering one of the purposes of Part III of the Family Law Reform Act is to give special protection to the interests of both spouses in the matrimonial home, the Council, questions the adequacy of the provisions in

section 42. In the opinion of the Council, the "actual notice" provision in section 42 gives third parties an unnecessary and unfair advantage over non-titled spouses. In the Stoimenov Case for example, the mortgagees or their agents had sufficient information in their files or easily available to them to make them suspicious that the properties in question were matrimonial homes. It would have been relatively simple for them to challenge the veracity of Mr. Stoimenov's affidavits and thereby prevent his fraud.

The Council recommends that the notice required under Section 42 to make the interest of third parties subsequent to the interest of a non-titled spouse be actual or constructive notice.

As a further protection, the Council recommends that at any time a non-titled spouse be able to register a notice in the appropriate Registry or Land Titles Office to the effect that a particular property is a matrimonial home. This notice would not have the effect, as does a registered designation under section 41 of the Act, of limiting Part III to only one property. It would merely be notice to third parties that despite what a titled owner may swear in an affidavit, that titled owner is a spouse and the property in question is a matrimonial home.

The Council recognizes that these two protective mechanisms will not prevent all instances of fraud; however, they may help to limit the situations in which false affidavits go unchallenged.

F. COMMON LAW SPOUSES

In preparing this brief, Council has not been unmindful of the situation of common law spouses. The Council has been following a number of developments in recent years which have tended to improve the position of common law spouses, such as the option of cohabitation agreements and the Supreme Court of Canada decisions in Rathwell v. Rathwell[15] and Pettkus v. Becker,[16] and Council is assuming that the doctrines of resulting and constructive trust which were applied in those cases will be given a wide and liberal interpretation by the courts so as to redress any inequities that might otherwise result upon the breakdown of a common law relationship.

SUPPORT ISSUES

A. NEED FOR GUIDELINES

Part of the mandate of the Ontario Status of Women Council is to promote the equal status and treatment of women under the laws of Ontario. The Council believes that in order for this goal to be achieved it is essential that women be encouraged and assisted to be economically self-sufficient. The Council therefore endorses the statement in section 15 of the Family Law Reform Act that every spouse has an obligation to provide support for himself or herself to the extent that he or she is capable of doing so.

The Council also recognizes, however, that situations of economic dependency are created through the division of labour adopted in many families. Some of those dependencies are of a short-term nature and can be overcome. Other dependencies must be considered irreversible, usually for one or more of the following reasons:

a. The dependent spouse is not employable due to age, ill-health or lack of marketable skills.

b. The dependent spouse, even if re-trained, would not likely obtain employment, again due to age or health factors or due to the realities of the market place.

The Family Law Reform Act recognizes the possibility of economic dependencies within marriage in that it provides that each spouse has an obligation to provide support for the

other spouse, in accordance with need, to the extent that he or she is capable of doing so. What the Family Law Reform Act does not do, however, is identify those situations in which spouses are to be considered self-supporting, those situations which are short-term dependencies and those situations which are long-term dependencies. This task of categorizing marital relationships according to support requirements has been left to the judiciary.

The abrogation of responsibility in this area on the part of the Legislature in favour of the judiciary has resulted in significant problems in the application of Part II of the legislation. In short, the judiciary have not been able to develop generally-accepted and well recognized guidelines regarding both the entitlement to support and the quantum of support for spouses. There is a notorious divergence in judicial opinion as to how each situation should be categorized, i.e. whether a particular spouse should be considered self-supporting from the start, self-supporting after a short period of rehabilitative support or never self-supporting. There is an even wider spectrum of opinion as to the quantum of support that should be awarded once the issue of entitlement has been determined.

The result is that lawyers practising in the area of family law are loath to advise their clients with any specificity as to the treatment the clients can expect from the courts on the issue of support. Clients, not knowing what their rights or obligations are, pursue more cases through litigation than they would if they could more accurately predict the outcome. The legal system falls into disrespect because awards often differ from expectations.

What is desperately needed at this time are further legislative guidelines for the judiciary, both in regard to entitlement to support and in regard to quantum of support.

First, the judiciary has to be advised in the legislation as to whether "self-sufficiency" is an objective or subjective concept. Is a spouse to be considered self-sufficient if that spouse has a gross annual income in excess of some stipulated amount (such as the poverty line)? Is a spouse's self-sufficiency to be determined through reference to the lifestyle that spouse enjoyed during the period of marital cohabitation? Should one spouse's self-sufficiency be assessed in light of the lifestyle the other spouse can enjoy after the separation?

Should an objective standard perhaps be used to define self-sufficiency in certain situations (such as marriages of short duration or marriages where there are no children) and a subjective standard be used in other situations (marriages of long duration or marriages where there are children)? If this type of distinction is introduced, what will be considered a long or short marriage? Individual judges at the present time have their own standards.

The Council feels that this very basic question of how self-sufficiency should be defined warrants detailed study and consideration by the Ministry and by the Legislature; and it recommends most strongly that legislation be introduced to clarify this issue.

Second, the legislation must direct the judiciary to consider the realities of the time in assessing dependency situations. Support orders cannot be made in a vacuum on the assumption that we live in an ideal society where men and women, custodial and non-custodial parents, senior citizens and youth all have equal economic opportunities. Judicial notice should be taken of the following facts:

a. Generally, women do not have equal access to employment opportunities due to differences in education, training experience, time spent in the workforce, family responsibilities and, to some degree, discrimination.

b. Women in Ontario who are working full-time earn, on average, 63.5% of the average earnings of men.[17]

c. More women than men hold part-time jobs.[18] Few part-time jobs have fringe benefits, such as pension plans.

d. Older women often have few marketable skills and are therefore hindered from finding employment.

e. It is often emotionally difficult for a person who has been out of the workforce for a number of years to re-enter the workforce.

f. It is often difficult for a person who has been away from an educational situation for many years to adjust to life as a student.

g. In some regions in the province, there is no access, or only limited access, to retraining or upgrading programs.

h. A custodial parent with sole responsibility for children on a day-to-day basis does not have the same time or energy to devote to a career or the same flexibility in time management that can enhance a career as a person with fewer or no parental responsibilities.

The Council realizes that many judges take the above factors into account as a matter of course. What concerns the Council, however, is that there have been a number of decisions regarding support that seem to ignore these variables. Specific reference to this type of issue in the legislation might avoid potential future injustice.

Third, the Council believes that much of the uncertainty surrounding support issues would be removed if the judiciary were given specific goals to strive for in different situations. At the present time, Part II of the legislation is completely void of objectives or goals that are to be achieved through support awards.

It may be suggested that once an assessment is done of the potential self-sufficiency of the applicant spouse, then everything else falls into place. This is not really so. Consider the following issues:

a. If different levels of self-sufficiency can be achieved through different retraining programs of varying lengths which program should be chosen?

b. What should be given priority: the needs of children or the desire to have a spouse self-sufficient?

c. If self-sufficiency is not possible without support in some form being paid, which is preferable: a lump sum payment that will produce self-sufficiency or continuing periodic payments?

The Council has not had sufficient time to devote to this very difficult area to enable it to offer a comprehensive outline of reform to sections 15 and 18 of the Family Law Reform Act. At this point, the Council merely wants to suggest that some framework be included in the legislation, and the following is offered as an example of what might be possible:

a. In marriages of long duration or in marriages where there are dependent children, the respective lifestyles of the spouses after separation should be similar.

b. Keeping in mind the principle outlined in "a" immediately above, wherever possible a clean break should be effected.

c. If a clean break is not possible, ongoing support should be used, wherever possible, to enable the dependent spouse to become economically self-sufficient.

d. If economic self-sufficiency is not possible as a result of disadvantages arising out of the marriage or its breakdown, or as a result of

economic realities in our society, then support should be seen as a long-term matter.

e. If there are dependent children, in addition to the principle that the respective lifestyles of the spouses after separation should be similar, the following principles should be followed:

i) the lifestyle of the children after the separation of the spouses should be as close as possible to the lifestyle of the family before separation;

ii) if economically feasible, the custodial parent should be able to stay at home and care for the children if this is in the best interests of the children. In considering what is in the best interests of the children, the court should take note of any common intention of the parties regarding child care that existed when the parties decided to have children.

B. CONDUCT FACTOR

Section 18(6) of the Family Law Reform Act removes conduct as a relevant consideration in the determination of entitlement to support. What this section does retain, however, is the relevance of bad conduct to the question of quantum of support. The court is allowed to consider a course of conduct that is so unconscionable as to constitute an obvious and gross repudiation of the relationship.

There have been very few cases in Ontario where the meaning of this provision has been fully investigated. The information available to the Council suggests that section 18(6) is rarely used by either spouse to have the quantum of support varied from what it would otherwise be if conduct were deemed completely irrelevant. Part of the explanation for the infrequent use of section 18(6) may be that some judges are so convinced fault is an inappropriate notion in marital disputes that they are declining to hear any evidence or arguments relating to supposed bad conduct.

Despite the infrequent use of section 18(6) the Council is nevertheless concerned about the presence of this clause in the legislation:

a. The whole trend in family law reform at both the provincial and federal levels has been away from concepts of fault: this section preserves a moralistic and judgmental view of the causes of marriage breakdown.

b. Because different judges define conduct "that is so unconscionable as to constitute an obvious and gross repudiation of the relationship" in different ways, there is uncertainty in the law.

c. The door is open for the old double standard of acceptable behaviour to be perpetuated.

Certainly of greatest concern to the Council is the possibility that this provision will be used in a discriminatory manner against women. The case of Gilbert v. Gilbert[19] is interesting to consider in this regard.

Mr. and Mrs. Gilbert had been married ten years when Mrs. Gilbert left the matrimonial home and started living with Mr. Bennett. She claimed her marriage had not been going well for several years before the separation. Her husband, at trial, denied that there had been any marital problems before Mr. Bennett had arrived on the scene. The Gilberts had two children who, after the separation, had continued to reside with Mr. Gilbert. At trial, Mrs. Gilbert sought custody of the children. Although the trial judge determined Mrs. Gilbert had been a very good mother and had assumed prime responsibility for the children during the marriage, he concluded that it would not be in the children's best interests to be exposed to an adulterous relationship. As a result, Mr. Gilbert was granted custody.

Mrs. Gilbert at trial was also seeking support for herself. In denying her claim, the trial judge made reference to section 18(6) as follows:

> "...The applicant not only broke up her own home, left her husband and children for Mr. Bennett but had no compunction about stealing a husband from Mrs. Bennett and breaking up a second family. This is hardly the situation which, according to its preamble, the Family Law Reform Act wishes to encourage, if one can take that preamble seriously. Instead of preserving the family unit, two families have been destroyed as families... I think it quite clear... that this is a case where section 18(6) is intended to apply..."20

The question arises as to whether the same conduct on the part of a husband would have been characterized with such condemnation by our courts.

After considering all of the above factors, the Council recommends that bad conduct be removed as a relevant consideration in regard to quantum of support as well as entitlement to support. This is consistent with the position taken by the Council in 1978 when there was considerable public discussion around this issue. To implement this recommendation, the Council would suggest that section 18(6) be amended to read as follows:

> The obligation to provide support for a spouse exists without regard to the conduct of either spouse; and likewise the quantum of support to be awarded should be determined without regard to the conduct of either spouse.

C. COST OF LIVING ADJUSTMENT

Courts, when making awards of periodic support under Part II of the Family Law Reform Act normally do not provide for adjustments to be made to the monthly payment on the basis of changes in the cost of living over the life of the order. Judges have the ability to include cost of living adjustments under section 19 of the legislation; however, most choose not to deal with this factor in advance. They prefer to treat variations in the cost of living as a material change in circumstances, allowing either party to apply under section 21 of the Act for a variation at a later date.

Over the last decade, the consumer price index of 100 in 1971 climbed to 270.3 by January, 1983. Real hardship was experienced by many dependent spouses and custodial parents when the monthly support payment remained a constant amount over a number of years. The only remedy for the recipient spouse, if the payor spouse would not voluntarily agree to increase the payments, was to apply to the courts for a variation of the support payment to take into account the increased cost of living.

Although a variation application is some protection for the recipient spouse in regard to the cost of living issue, it is not an adequate solution to the problem. It can take months from the date the spouse first contacts his or her lawyer to the date the spouse obtains a variation order. In the meantime, there are hours lost and hundreds of dollars spent to have the application brought. If the spouse is successful in obtaining increased support, the order will not

be retroactive to compensate the spouse for the lost buying power since the date of the last court order. As well, in all likelihood the new amount of the support payments will be inadequate in a year's time and a further variation application will have to be brought once the spouse is sure that the court will recognize the change in the cost of living as being significant enough to warrant a variation.

The Council recommends that Part II of the Family Law Reform Act be amended to provide that a periodic support payment (i.e. a regular monthly payment) be adjusted automatically on each anniversary date of the order to take into account variations in the cost of living over the previous year. The percentage increase in support payments could be limited to the percentage increase in gross income received by the payor spouse over the previous year. This is what is normally done in negotiated separation agreements to prevent any undue hardship to the payor spouse. The court, when making the original order, could also have the discretion to exclude the application of the automatic variation provision.

The Council makes this recommendation on the assumption that most payor spouses are in a business or employment situation where there would likely be some annual increment in income. In addition, the Council's reasoning is as follows:

a. Under the present system, the already fragile economic state of a dependent spouse and children is further weakened through the continual erosion of the buying power of the support payments.

b. The payor spouse has more resources and often more flexibility in terms of time, to challenge an inappropriate increase.

c. The need for variation applications would be reduced and as a result there would be a reduction in time lost, a cost saving to the applicant spouse and reduced administrative costs to be paid by the taxpayer.

The Council realizes that it will be a very difficult task to draft an automatic variation provision in legislation, considering the wide variety of situations the provision would cover. Nevertheless, the Council believes that such a provision is important to redress the uneven impact of inflation on payor and recipient spouses.

D. EFFECT OF DEATH ON SUPPORT PAYMENTS

Just as the courts normally will not address the issue of cost of living adjustments when they make an initial support order under Part II of the Family Law Reform Act, similarly they normally will not address the issue of what is to happen to the support payments upon the death of the payor spouse. Section 19(1)(i) of the Act specifically empowers the court, if it so wishes, to order that the obligation and liability for support will continue after the death of the payor spouse and be a debt of his or her estate for such period as is fixed in the order. The Act goes on to provide that if such a provision is not included in the support order, the order will terminate upon the death of the payor spouse.

The significance of this for the recipient spouse and possibly dependent children is that a further application has to be made to the court under the Succession Law Reform Act of Ontario to ensure that support in some form is forthcoming for that spouse and any dependent children from the estate of the deceased spouse. For the recipient spouse, there are a number of inherent disadvantages to this system.

The dependent spouse has to initiate a second court application merely to maintain the status quo. At the hearing, he or she once again has to establish need and debate the quantum of support. There may be a hiatus between the last payment before the death of the payor and the first payment ordered to be made by the estate. Just as with the cost of living problem, the full burden of an imperfect system falls on the shoulders of the person who may have the least resources to react.

The Council recommends that Part II of the Family Law Reform Act be amended to provide that all support orders are automatically binding upon the estate of the payor spouse, unless the court specifically orders to the contrary. Presently, the onus is on the dependent spouse to persuade the court that a support order should be binding on the estate of the payor spouse. This onus is rarely met. The Council recommends this onus be reversed so that the payor spouse, at the time the original order is made, would have to persuade the court why a support order should not be binding on the estate. One way the payor spouse could so persuade the court would be to designate irrevocably the recipient spouse the beneficieary of adequate life insurance coverage so that the continuation of support payments after death would not be necessary. Another way would be for the payor spouse to undertake that upon his or her death various property interests be transferred to the dependent spouse.

It should be noted that the executor or administrator of the estate of the payor spouse could apply to the court after the death of the payor spouse for an order varying or terminating any support order that continued after the death of the payor spouse. Until such an application was brought, however, the dependent spouse and children would be assured of ongoing support to meet their basic needs.

The Council recognizes that this is a difficult area and it offers its recommendation as one way to alleviate the problem of the surviving dependent spouse and children. The Council acknowledges that there may be other equally valid solutions to the problem and it urges the Ministry to canvass carefully the various options.

E. COMMON LAW SPOUSES

Under Part II of the Family Law Reform Act, in addition to spouses covered under Parts I and III of the Act, protection is given to the following persons;

> ...either of a man and woman not being married to each other who have cohabited,
>
> 1. continuously for a period of not less than five years, or
>
> 2. in a relationship of some permanence where there is a child born of whom they are the natural parents,
>
> and have so cohabited within the preceding year...

This in effect means that certain common law spouses are treated the same way as legally-married spouses for the purpose of support rights and obligations.

The Council believes that a requirement of five years of continuous cohabitation by a couple before they are considered spouses is too onerous to meet adequately the needs of common law spouses in Ontario. It recommends that the required period of continuous cohabitation be reduced from five years to three years.

The Family Law Reform Act in its present form puts a further limit on the ability of a common law spouse to obtain support from his or her partner. Even if a common law spouse falls within the definition of spouse as set out above, he or she can only bring an application for support within the first year following the separation. There is no comparable restriction on the right of a legally-married person to seek support from his or her spouse. The Council sees no purpose for having this one-year limitation and recommends that it be deleted.

In doing so, it wants to protect the common law spouse who manages to be financially independent over the year following the separation but then falls on harder times later. It is certainly conceivable that a common law spouse, who is the custodial parent of a child born to the couple, may have difficulty being continuously self-supporting in the years following the separation. The child could develop special needs or handicaps requiring the parent to devote more time to parenting and less time to his or her career. The laws have to be flexible enough to deal with this type of situation.

As with legally-married spouses who first apply for support several years after a separation, the courts would have the discretion to refuse to award support to a common law spouse who has delayed in pursuing his or her remedies, if considering all of the factors, a support order would be inappropriate. In this way, any undue prejudice to a prospective payor spouse could be prevented without resorting to an imposed limitation period.

F. ENFORCEMENT OF SUPPORT OBLIGATIONS

It is well-recognized by all levels of government and by the legal community that one of the major problems today in the area of family law is the enforcement of support and maintenance orders. The Council has been advised that our present enforcement schemes are ineffective and that the provisions in the Family Law Reform Act dealing with enforcement have to be strengthened. The Council regrets that it did not have more time to assess this problem fully. It urges the provincial government, in cooperation with its federal counterpart, to do a full-scale study of how support obligations regarding spouses and children can be more effectively enforced. Until such a study can be completed, however, the Council offers the following recommendations of a piecemeal nature to help bolster the existing enforcement mechanisms.

Several family law experts who made submissions to the Council emphasized that support enforcement procedures have to be more streamlined than they are at present. The current system of enforcing support and maintenance orders in Provincial Court (Family Division) is a time-consuming and expensive matter for the dependent spouse and a costly matter for the taxpayers.

If one spouse defaults on a monthly payment, the dependent spouse must notify the court accordingly, obtain a court date and then serve the payor spouse with notice of the hearing. Normally the notice is mailed to the payor spouse; however, if that spouse does not attend on the hearing date, the court merely orders that he or she be personally served with notice of a new hearing date. If that does not succeed

in getting the payor spouse before the court, at the next hearing a warrant may be issued for his or her arrest. This procedure, just to get the payor spouse before the court, can take months. Meanwhile, no support is being paid.

Adjournments of an enforcement hearing are possible for many reasons other than service problems. The payor spouse may want an adjournment because he or she has not yet prepared the proper financial information for the court. The payor spouse may want to retain a lawyer or change lawyers. The payor spouse may want to argue that the support or maintenance order is no longer appropriate and that a variation should be granted. If the original court order was from a Provincial Court, then the variation application can be handled expeditiously. However, if the order to be varied was of a higher court, there is likely to be a significant delay in the enforcement proceedings. Since a Provincial Court (Family Division) does not have the jurisdiction to vary a support or maintenance order of a higher court, it will most likely stay the enforcement proceedings while the payor spouse brings a variation application in the court with jurisdiction.

Once the court has made a finding that the default of the payor spouse is for some reason other than his or her inability to pay the required support, the court may give the payor spouse further time to pay the arrears. If the arrears still do not get paid within that time frame, there may be a further hearing to determine what is to be done.

As far as the Council is aware, there is no generally accepted course to be followed by the courts in trying to enforce compliance with their orders. Some judges try supportive and persuasive techniques, others resort to wage attachments whenever possible, still others find the threat of imprisonment most effective. Some judges systematically award costs against defaulting spouses; others feel this is salting the wound and they let both parties pay their own legal expenses.

The Council was informed by family law experts that not only are there wide differences in the types of enforcement orders made by the courts, but also the procedures in Provincial Courts (Family Division) throughout the province vary significantly. It is the policy in some courts to require the presence of the dependent spouse or his or her representative at all court hearings. In other courts, a court clerk assumes much of the responsibility that otherwise would be taken by the recipient spouse.

With the uncertainty that pervades the enforcement system in our province, it is understandable that the system does not operate very effectively. Spouses who avoid making support payments - not because they are unable to pay but because they do not want to pay - are not particularly threatened by the Provincial Court enforcement system. Many realize that they can be late with their payments on a regular basis without suffering any negative consequences. Many know that they can be in arrears for a number of months and have numerous court appearances before a wage attachment or a prison sentence will be ordered.

On the other side of the coin, recipient spouses are discouraged from pursuing enforcement remedies through Provincial Court because of the commitment required on their part and the uncertainty of getting a satisfactory result. The Council was reminded that a recipient spouse earning income in addition to support payments, may be reluctant to jeopardize that income by taking time off work every month to attend an enforcement hearing.

In many areas, that spouse will not have access to legal aid funds so that a lawyer can be retained. Furthermore, it is unlikely the recipient spouse will have sufficient funds to hire a lawyer on a private basis.

Although the Council has not had an opportunity of conducting a full review of enforcement proceedings in Provincial Court, it wishes to make the following recommendations based on the submissions it received from family law experts and representatives of women's groups:

1. A wage attachment should be ordered automatically once a payor spouse falls into default.

Upon the filing of an affidavit by the recipient spouse indicating that a support or maintenance order is in arrears and stating the place of employment of the payor spouse, the Court should order a wage attachment, without the necessity of first conducting a court hearing. If the payor spouse wishes to contest the wage attachment, that spouse could then apply to the court to have the order rescinded. Presumably, the court would only rescind the order if the payor satisfied the court that he or she would take suitable steps to ensure that the recipient spouse received support

payments on a regular basis as they became due.

Some of the advantages of this procedure are:

a. The payor spouse would have the opportunity of making regular payments and only if he or she did not make the regular payments when due, would any action be taken. The payor spouse could therefore retain control over the situation.

b. The recipient spouse would be put to a minimum of effort and expense to enforce those rights already given him or her by court order.

c. The onus of bringing a court application would fall on the person most able to pay for such an application.

d. The administrative cost of the enforcement system would be reduced at a cost saving to taxpayers.

e. The message would be given in a very clear way that support obligations will be vigorously enforced by the courts.

f. Fewer families would have to seek welfare; and again taxpayers would benefit.

The Council sees a major disadvantage of the system being the involvement of a third party, the employer, in the relationship between the two spouses. However, employers are already asked to collect income taxes, Canada pension plan contributions and unemployment insurance premiums from

their employees. Already some employers arrange for an automatic deduction for such extra expenses as OHIP premiums, mortgage payments and savings in various forms. There is no reason why support obligations should be treated any differently. In the realization that some employers would rather fire an employee than go to the extra effort of implementing a wage attachment, legislation should provide that no employer can discriminate against an employee merely because a wage attachment for support payments has been ordered. If employers were allowed to react in this fashion, it would not only hurt the employee but it would also prejudice the dependent's position and could result in more expense to the taxpayer through the welfare system.

2. Imprisonment or the threat of imprisonment should be used more often by the Courts

Several family lawyers making submissions to the Council stated that in their opinion the threat of imprisonment is a very useful tool to force the unwilling spouse to meet his or her support obligations. The use of imprisonment in the enforcement of support orders gives the clear message to payor spouses that support obligations must not be taken lightly. In that sentences can be intermittent - to be served on weekends and holidays - the concern raised that a person cannot earn money while in jail really has no application. In fact the jail sentence might help the payor spouse to economize.

To the extent that the courts may have to carry through with imprisonment, the major disadvantage of this enforcement technique is the strain it places on our already overcrowded jails and prisons.

3. Costs should be awarded systematically against the defaulting party

It can be very costly for a recipient spouse to retain a lawyer for assistance in enforcement proceedings, especially if the enforcement problem is a continuing one. The Council believes, however, that for a recipient spouse in many jurisdictions, the involvement of a lawyer is essential if present enforcement mechanisms are to be used to their fullest advantage. In the opinion of the Council, a recipient spouse should not be put to any extra expense to enforce rights already given in a court oder. The Council therefore recommends that legal costs be awarded systematically in enforcement proceedings, on a solicitor-client basis, whenever it is apparent to the court that the reason for the default is not inability to pay but unwillingness to pay.

Although the Council agrees that the changes in the substantive law regarding enforcement can result in a more effective enforcement system, it believes that the underlying cause of delinquency in the payment of support is attitudinal in nature. There is a general feeling in society that support orders are not of the same importance as other court orders, that they need not be given the same respect. The unwritten rule is that if one is having difficulty making ends meet, the first expense to be dropped is the support payment. It is generally assumed that a certain amount of delinquency will be condoned by the legal system and will not result in any prejudice to the payor spouse.

It is easy to see how this attitude has gained respectability. As mentioned above, it takes months to enforce a support order in the courts. In the meantime, no interest is charged on the arrears and the only inconvenience experienced by the payor spouse is that he or she has to attend at court on a few occasions.

It is this attitude which must be attacked if any progress is to be made in the enforcement of support obligations. In our schools, churches, community groups, and other institutions, we have to emphasize the responsibilities each family member has to all other family members. The significance of marriage, the importance of deciding carefully before having children, the necessity of caring for dependents are all concepts which have to be internalized by our children if we want them to mature into responsible adults. The Council therefore wants to emphasize the importance of focusing our efforts in the enforcement area not only on technical systems that may help to "catch" delinquent spouses. Efforts must be taken in a more peripheral way - with more long-term goals in mind - to prevent the climate where irresponsibility to other family members is an acceptable way of life.

POSSESSION OF THE MATRIMONIAL HOME

A. EXCLUSIVE POSSESSION OF THE MATRIMONIAL HOME

Section 40 of the Family Law Reform Act establishes the presumption that a spouse is equally entitled to any right of possession of the other spouse in a matrimonial home. Under section 45(1), however, the court has the ability to order that one spouse will have exclusive possession of a matrimonial home for a specified period of time. During the period when one spouse has exclusive possession of a matrimonial home, the other spouse is expected to find accommodation elsewhere. The court may make an order for exclusive possession under section 45(1) only if, in the opinion of the court, other provision for shelter is not adequate in the circumstances or it is in the best interests of a child to do so.

The courts have some difficulty deciding how section 45 is to interact with section 40 and section 4 of the legislation. Under section 4 each spouse after a separation is entitled to have the family assets (including any matrimonial home) divided in equal shares. In most family situations, if the value of the matrimonial home is to be divided between the spouses, the home will have to be sold. If the home is sold, obviously neither spouse can continue to reside in it. To express the dilemma in another way, if one spouse is granted exclusive possession of the matrimonial home for a number of years, the right of the other spouse for an equal division of family assets cannot be realized until the period of exclusive possession has terminated.

When faced with the competing interests of the spouse wanting to realize his or her interest in the family assets and the other spouse wanting to stay in the home, the courts have reacted as follows:

a. Initially, it is assumed that both spouses are entitled to an equal division of family assets under section 4, with the division occuring soon as possible after the trial.

b. If one spouse wants to postpone the division so that he or she will be able to stay in the matrimonial home for a certain period of time before the home has to be sold, the onus is on that spouse at trial to persuade the court that an order for exclusive possession of the matrimonial home under section 45(1) is appropriate in the circumstances.

c. Before the court will make such an order, it must satisfy itself under section 45(3) that other provision for shelter for the person seeking exclusive possession is not adequate in the circumstances or it is in the best interests of a child for an order of exclusive possession to be granted.

It is obvious, from the case law that it is very difficult to establish alternative accommodation is unavailable. Very few orders for exclusive possession have been made on this basis. When they are, it is usually because there are several dependent children living in the home and it would

be difficult to find a new home within the family's budget.

The more common argument submitted is that it is in the best interests of the children that they be allowed to continue in the matrimonial home after the separation. In the usual case, the children are integrated into the community: they go to the local school, they have friends in the neighbourhood and they attend extra-curricular activities close by. If they are uprooted from this support network soon after the separation of their parents, they will have to adjust to two major losses at the same time. This is asking too much of the children and they may suffer unnecessarily as a result.

The courts have not been too receptive to this argument. Judges acknowledge that in most situations, it is in the best interest of children to remain in the matrimonial home after the separation of their parents. They state that if the Legislature had wanted them to make an order for exclusive possession of the home in favour of the custodial parent in all of the cases where it would be in the best interests of the children to do so, the Family Law Reform Act would have been structured differently. With this in mind, the judges generally reserve the application of section 45(3) to those exceptional circumstances where one or more of the children concerned are having an especially difficult time adjusting to the separation.

The Council acknowledges that in many situations, it is not economically feasible for a custodial parent and the children to remain in the matrimonial home after the separation. In those cases, an order for exclusive possession of the

matrimonial home would serve no purpose, because it would place the whole family in jeopardy from a financial point of view. Nevertheless, the Council believes there are a significant number of cases where the custodial parent and the children should be allowed to continue in the matrimonial home - at least for a transition period - to allow the family to adjust to the separation before it has to adjust to a new home and neighbourhood. In these cases, the non-custodial parent may have to postpone any plans to buy a new home with his or her share of the equity from the matrimonial home, but financially, the family would still be able to manage.

Section 19 of the Children's Law Reform Act[21] states that one of the purposes of the legislation is to ensure that applications to the court in respect of custody of, incidents of custody of, access to and guardianship for children will be determined on the basis of the best interests of the children. Section 24 stipulates that the merits of this type of application will be determined on the basis of the best interests of the child. It seems ironic to the Council that with this focus on the best interests of children in the law relating to custody and access, there is no mention whatsoever of the best interests of the children in the law relating to marital property rights, support obligations and possession of a matrimonial home. The decisions that are made in all of these areas can affect the best interests of children as much as the decisions that are taken concerning custody and access.

The Council therefore recommends that Parts I and III of the Family Law Reform Act be reconstructed to make it very clear that in considering whether a custodial parent should be

granted exclusive possession of a matrimonial home, the paramount consideration should be: what is in the best interests of the children. This factor should take precedence over the right of either parent to realize his or her interest in the home. A reverse onus could be used in this situation so that the custodial parent would be allowed to stay in the matrimonial home with the children for a transition period unless the other spouse could establish that it would not be in the best interests of the children to continue to live there.

B. TEMPORARY EXCLUSIVE POSSESSION OF THE MATRIMONIAL HOME

According to section 45(2) of the Family Law Reform Act, an order for temporary exclusive possession of a matrimonial home can be awarded pending the hearing of further applications under the Act. Applications for temporary exclusive possession can be brought while both spouses are residing in the home or after one spouse has left the home. The test set out in section 45(3) of the Act regarding applications for exclusive possession beyond the date of trial is also used by the courts in assessing applications for temporary exclusive possession. Just as with applications for exclusive possession, the judiciary has interpreted the test so as to restrict the situations in which an order for temporary exclusive possession will be granted.

If the application is brought when both spouses are residing in the home, the court will be reluctant to allow one spouse sole possession of the home and thereby to force the other spouse out of the home. The judges worry that they are forcing a separation on a couple who may otherwise work out their differences. They also do not want to give either parent an undue advantage over the other in any custody dispute. In that interim custody is often a significant fact in the final custody determination, the parent who is given interim custody of the children and temporary exclusive possession of the home greatly benefits.

In practice, this attitude on the part of the judiciary means that if both spouses are still residing in the home, an order for temporary exclusive possession may be granted only if one spouse is extremely violent or abusive

with the other spouse or with the children.

This restrictive policy on the part of the judiciary prejudicially affects women in a number of ways:

a. It is more difficult for a homemaker to move out of the home and find alternate accommodation than it is for a person who is employed and has a steady income. Homemakers may therefore be trapped in unhealthy marital situations because they cannot get their spouses out of the home and they do not have the option to leave.

b. Women in potentially violent family situations may have to wait until violence has erupted before they will succeed in getting an abusive spouse out of the home.

c. Women who assume primary responsibility for children in the family may not be able to separate from a spouse if that spouse refuses to leave the matrimonial home. There are few places offering temporary shelter for women and children. A woman may not want to uproot the children from their neighbourhood or school, even on a temporary basis. A woman may not want to leave the children in the home and move out alone, due to her sense of responsibility to the children. Until such time as her spouse is violent or abusive, she may not be able to obtain an order requiring her spouse to find alternate accommodation.

It is also arguable that the restrictive policy does not serve the best interests of the children in the family.

a. There is likely to be tension in the home if a separation is being contemplated by one or both of the spouses. It may be harmful for the children to be exposed to this tension.

b. Children may end up being exposed to more family violence and abuse than would be the case if a separation was effected when initially desired.

c. If a parent who has primary responsibility for the children has no option but to leave the matrimonial home and take the children to temporary accommodation, the children will suffer by being uprooted from their home and normal patterns.

d. If the parent who has assumed primary responsibility for the children feels compelled to leave the home but has nowhere to take the children, the children may be left in the care of the parent who is less able to meet their needs.

Once one spouse has left the matrimonial home, an application by that spouse for temporary exclusive possession of the home will be successful in only a limited number of cases. The spouse will first have to bring his or her application very quickly. If the spouse outside the home has the children with him or her and if it is apparent that this spouse should be given interim custody of the children, there is a good chance temporary exclusive possession of the home will be granted. It will have to be obvious to the

court, however, that there is no suitable alternate accommodation available to the spouse and the children. The applicant spouse also will have to meet the argument that if he or she removed the children from the home, the best interests of the children must not require their being in the home.

If the spouse who left the home did not take the children with him or her, it is a much more difficult task to get interim custody of the children and then temporary possession of the home. There is an assumption that if a spouse leaves children with the other spouse - even on a temporary basis - he or she must concede the other spouse can adequately care for the children.

It is the belief of the Council that there would be a reduction in the incidence of family violence and the best interests of children would be better served, if the courts were more willing to grant temporary exclusive possession orders while both spouses were still residing in the matrimonial home. The Council recommends that there be a simple, inexpensive and speedy procedure whereby one spouse can bring the issue of temporary exclusive possession of a home before the courts. The Council also recommends that the court, in considering such an application, be directed to assess:

a. the availability of other accommodation within the means of both spouses;

b. the financial position of each of the spouses and their ability to seek other accommodation;

c. the conduct of the spouses towards each other and the children;

d. the needs of the children; and

e. the impact on the physical and psychological health of each member of the family if the spouses were permitted to stay under the same roof.

What concerns the Council is that the current legislation, as it is interpreted by the courts, may protect certain proprietary rights of the spouses, but at a loss of the more intangible rights of the spouses. More consideration must be given to the right of a spouse to live in a home free of violence and harassment. Also to be considered are the hidden costs of forcing family members to stay in an unhealthy environment. Society as a whole ends up paying the bills when various family members require help as a result of the physical or psychological damage done in a destructive family setting. A timely intervention might help save the family members and society as a whole from more serious problems in the future.

During its consultations with family lawyers, the Council was also made aware of another problem with section 45(1) of the Family Law Reform Act. Although the court has jurisdiction under this section to direct that the contents of the matrimonial home, or any part thereof, remain in the home for the use of the person given possession, it does not appear to have the jurisdiction to allow the spouse who is no longer residing in the home to take some of the contents of the home to his or her new residence. In situations where

one spouse has to leave the home in a hurry, possibly as a result of family violence, and where that spouse and the children have set up a new household, it is very important that they be able to get some of the contents from the home to furnish the new residence. The legislation should be amended to make it clear the courts have jurisdiction to grant this type of order.

C. ALTERNATE ACCOMMODATION FOR BATTERED WIVES

Associated with the issue of interim exclusive possession of the matrimonial home is the question as to whether Ontario communities offer adequate alternate accommodation on an emergency basis to battered wives.

In November, 1982, the Standing Committee on Social Development of the Ontario Legislature released its First Report on Family Violence, entitled "Wife Battering". In that report, it was estimated that one in ten married women in Canada is battered by her husband. As of July, 1982, there were 35 transition houses in Ontario with a capacity of 463 beds to house battered women and their children. The Standing Committee's report concluded that this capacity for all of Ontario is sorely inadequate.[22]

Several lawyers and representatives of interested groups making submissions to the Council concurred with this conclusion and stressed the need for more transition homes for the victims of family violence.

It was pointed out that the police, when responding to a call for help from a victim of domestic violence, often will advise the victim to leave the home and will let the violent party remain. Once the victim is out of the house, and assuming she does not want to resume cohabitation with her spouse, she must seek alternate accommodation or she must obtain an order for exclusive possession of the home. Both of these options present problems.

The wife with no independent income will not be able to find alternate accommodation until she gets support from her husband or obtains welfare. An application for support - just like an application for interim exclusive possession of the home - can take weeks to process. In the meantime, the wife and usually the children need a place to stay.

As was mentioned above, the procedure whereby a battered wife can get interim exclusive possession of the matrimonial home must be simplified. Once violence in the family has been established, the onus should be on the violent party to persuade the court an order of interim exclusive possession in favour of the victim should not be granted.

In addition, since a victim may not always want to stay in the home for fear of continual harassment or attacks by her spouse, there is a real need for short-term accommodation in transition houses.

According to the Report of the Standing Committee, there would likely be significantly more emergency shelters established in the province if the funding of these facilities at the federal, provincial and municipal levels was restructured. A detailed analysis of the present funding arrangements and of various options for change is beyond the ambit of this brief. Nevertheless, the Council wishes to express its full endorsement of the Committee's recommendations for legislation dealing specifically with the issue of wife battering. It also endorses the recommendations of the Committee for increased funding of interval houses by all levels of government pending a more comprehensive treatment of the problem in new legislation.[23]

In studying wife-battering, the Council was especially struck by the unique problems facing the victims of family violence in rural areas.

> "Although victims reside in both urban and rural areas, rural women encounter unique problems. Unless they have access to a car (which is unusual), they may have to rely on friends, family or the police for transportation to a shelter, sometimes hundreds of miles away. Bus service may be non-existent; taxi service, if available, can be very costly... In rural areas, transportation assistance from the Ontario Provincial Police... may be delayed, depending on the distance an officer must travel to reach the victim's residence. At night, reduced OPP operations could further affect response time to a domestic call.
>
> Because of "party-lines", the rural victim may hesitate to phone for assistance. If she has to call long distance for advice and wishes to do so without her husband's knowledge, he will be alerted when the phone bill arrives.
>
> The woman's emotional isolation is intensified by the lack of support services available in rural communities. If she decides to leave her husband, efforts to achieve economic independence may be hampered by the absence of jobs, adult retraining programs, and subsidized housing units..."24

The Council believes that the provincial government is under an obligation to provide rural communities not only with special financial assistance for the establishment of emergency shelters, but also with professional guidance and leadership to encourage the development of these facilities.

DOMESTIC CONTRACTS

Part IV of the Family Law Reform Act allows a man and a woman to enter a marriage contract either before or during marriage to deal with their property rights and support obligations vis-à-vis each other. In such a marriage contract, the couple is free to write their own rules for their particular relationship in regard to property and support issues. Subject to the limitations discussed below, to the extent that the provisions in such a contract differ from the statutory provisions in Parts I and II of the Family Law Reform Act, the contractual terms prevail.

There are three major limitations to spouses' ability to enter marriage contracts. First, a person cannot, through signing a marriage contract, release his or her possessory rights in or right to control of a matrimonial home under Part III of the Family Law Reform Act. Second, any provision in a marriage contract relating to support obligations can be overridden by court order at a later date if: (1) the provision for support or the waiver of the right to support results in circumstances that are unconscionable, (2) the provision for support is to a spouse who qualifies for an allowance for support out of public money, or (3) there has been default in the payment of support under the marriage contract. Third, any term of a marriage contract relating to children can be overridden by court order if it is judicially determined that the provision is contrary to the best interests of the children.

Part IV of the Family Law Reform Act also allows a man and a woman who are cohabiting but are not married to enter into a cohabitation agreement dealing with their property rights and support obligations. In regard to property rights, these agreements are normally used either to alter the basic common law rule that common law spouses are separate as to property, or to restrict the application of the doctrine of constructive trust. In regard to support obligations, a cohabitation agreement is often used to ensure the common law spouse will never be considered "a spouse" under Part II of the Family Law Reform Act subject to the same rules regarding support as apply to a legally-married spouse. There is the same limit on the right of a common law spouse to contract regarding support issues as exists for legally-married spouses.

Under Part IV of the Family Law Reform Act, recognition is given to the fact that the rights and obligations set out in the legislation regarding property and support rights for both legally-married and common law spouses may not be perceived as appropriate by all those in Ontario affected by these laws. The Council realizes that if its recommendations for reform were implemented, there would still be some legally-married spouses who would not want the new provisions to apply to their relationship. Also there would be some common law spouses who would be disappointed that not all of the legislative provisions would apply to them. In recognition of this fact that the Family Law Reform Act - even if amended - would not please everyone and would not meet everyone's needs, the Council recommends that the rights of Ontario couples to enter into marriage contracts and

cohabitation agreements be continued. In this regard, the Council sees no need to change the provisions in Part IV of the Act.

With reference to the specific recommendations for reform contained in this brief, the Council anticipates that marriage contracts will be used to deal with the following types of issues:

a. will the deferred community of property regime apply to the couple, or will the couple choose another property regime?

b. will the deferred community of property regime be terminated by death, as well as by separation or divorce?

c. what property will fall within the community property?
will business assets be excluded?
will gifts and inheritances be included?

d. is there a particular asset that will be excluded from the application of the general rule regarding sharing?

e. how will debts be handled if the couple separates?

f. will the co-ownership rule regarding the principal residence apply to any dwelling?
will it apply to all matrimonial homes?

g. in what circumstances will one spouse be able to claim support from the other?

h. will there be an obligation on the spouses to have wills drawn in a particular way?

The Council wishes to reiterate that it sees a deferred community of property regime, coupled with co-ownership of the matrimonial home, the system best suited to meet the needs of the majority of Ontario's residents. However, it realizes there will be people who do not like some aspects of this regime and it sees no reason why these people should be precluded from adopting their own regime. Similarly, the Council sees no reason why a couple should be precluded from choosing principles regarding support rights and obligations that will apply to their particular situation, if that couple can agree to their own terms regarding this issue.

THE PROCESS IN FAMILY LAW DISPUTES

A. MEDIATION

It has always been of concern to the Council that many couples following marriage breakdown, find themselves caught in an adversarial process that heightens tension within the family and destroys whatever family unity survived the marriage breakup. The Council believes that many spouses would prefer an alternative to the present court system of deciding family law disputes. They may not have the insight or the resources at the point of crisis to seek out and then implement an alternate form of dispute resolution, though if such an alternative were offered to them in a constructive way they might very well take advantage of it. Mediation is such an alternative.

Mediation is a system whereby the spouses, and in some cases the children as well, would meet with a third-party mediator who would help them resolve outstanding family law issues arising out of the separation. The role of the mediator would be as a facilitator - to help the family help itself. The mediator would have no decision-making authority. With the help of a mediator, the family would be able to identify the issues requiring consideration, the options available and the merits and disadvantages of the various options for each family member. The family itself would then choose the option best suited to meet the varied needs of its members.

Spouses would go into the mediation process after first having independent legal advice as to their rights and obligations under the law. They would have independent legal

advice again before signing any legal agreement.

At the present time, and in a very limited sense, mediation is an option available to separating spouses. In many communities throughout Ontario, individuals - generally with experience in the helping professions - are expressing their willingness to act as mediators in family law disputes. Many of these individuals, although they have had extensive experience in the sphere of individual, family and marital counselling, have often not had much, if any, experience in actual family mediation. Nevertheless, in recognition of the demand by many separating spouses for an alternative to litigation, these individuals are starting private practices in mediation.

In those communities where there are some professionals getting into the mediation field, it is still only a small number of cases that are handled through mediation. The public at large is generally unaware of mediation as an option. Many lawyers and judges are not informed about the mediation option. In short, although mediation is the pet project of a number of family lawyers and other professionals in Ontario, it does not at the present time have the visibility that it needs if it is to be a real alternative for separating spouses.

Recently, the Family Mediation Service of Ontario was established through the co-operation of family lawyers, other professionals and court officials. This service helps make mediation an available alternative to people in the Toronto area by referring willing participants to qualified mediators. The service has received support from both family lawyers and judges, who have been encouraged to divert clients from the

traditional adversary system into this alternative forum. The Council is anxious to learn how this new mediation service is faring.

Mediation as an alternative has recently received further support through its mention in the Children's Law Reform Act[25] of Ontario. Under Section 31 of that Act, upon an application for custody of or access to a child, the court, at the request of the parties, by order may appoint a person selected by the parties to mediate any matter specified in the order. The court cannot force an unwilling couple into mediation but it can pursue the possibility of mediation with all couples and encourage this alternative whenever possible.

The Council urges the Ministry to consider mediation as a viable option to litigation for the resolution of disputes relating to matrimonial property and support obligations as well as custody and access. The advantages of mediation for the resolution of family law disputes are numerous:

a. Mediation allows the family to come up with the solution that is most appropriate for itself. In most situations, it is fair to say that various family members together have the greatest knowledge about the workings of their family: about the needs of each family member and the manner in which those needs can be met without unduly prejudicing the lifestyle of any other family members. As a matter of common sense, it is better to have decisions about a family taken by those most familiar with the

family rather than to have a third party, whose knowledge of the family is superficial at the best of times, imposing his or her notion of a suitable arrangement on the family.

b. When the family itself works together for a common solution, it is allowed to share a positive experience following the negative experience of the marriage breakdown. Sharing a common goal allows the family to focus on the future with some sense of hope and enthusiasm. Litigation focuses on the past. As the initial interaction between the spouses following the marriage breakdown, it puts the family into a pattern of hostile, negative thinking right from the start. If the interaction between spouses or former spouses after marriage breakdown is to be constructive over the years - both for the benefit of the adults and for the benefit of any children involved - it is important to establish good communication immediately after the breakup.

c. Mediation is based on the premise that each family member has some respect for and concern about the other family members. As a process, mediation forces the participants to put aside negative and destructive feelings and patterns of interaction. Each participant is encouraged and supported in acting in a reasonable and responsible manner. Litigation often has the opposite effect.

d. Settlements arrived at by the family members themselves have a much greater likelihood of success than those imposed on the family by a third party. Not only is the settlement likely to be more appropriate for the particular family, but the family also will have a greater commitment to making the settlement work. Additionally, the family will understand how to use the mediation process and will likely refer to that process first in the future if a difficulty arises.

e. Mediation as a decision-making process is much quicker than the litigation process. A couple can move through a mediation process as quickly as they wish. In this sense, the process is responsive to the needs of the family. The length of time taken to complete a family law case in the courts has very little to do with the family. Instead, the critical variables there are the workload of the different lawyers and the backlog in the courts.

f. Mediation has the potential of being a much less costly process in contrast to the litigation process. Mediators at the present time charge between $40-$80 an hour and they see their clients on the average between six and ten times in all. The only costs in addition to those of the mediator are legal costs for independent legal advice for the parties and for the preparation of the separation agreement. Thousands of dollars are

spent on lawyer's fees by each spouse if a family law matter - even a relatively simple one - finds its way into the courts. In addition, with litigation there are all the hidden costs of the judge, the court clerks, the court reporter, the other staff members at the Court House and the courtroom space - all of which are borne by the taxpayer.

The Council feels that the full benefits of mediation as an alternative to litigation will only be realized once mediation is made a mandatory step in all family law disputes. However at present the Council does not have confidence that the necessary structures are in place to support mandatory mediation:

a. There are no formal training programs for family mediators in Canada that offer continuing supervision. All that exists at the present time are special seminars or lectures on mediation as ancillary to a study of broader topics, such as marriage or separation counselling.

b. In Canada, there is as yet no generally-accepted way in which family mediators can become accredited.

c. There are not enough trained and experienced family mediators in Ontario to have all family law disputes channelled through mediation.

B. UNIFIED FAMILY COURTS

In its Second Annual Report issued in April, 1976, the Council repeated a recommendation that it had made to the Attorney General during consultations on family law matters - namely that a unified family court system be provided in Ontario as soon as possible. The Council again wants to endorse the concept of a unified family court system and again encourages the provincial government to do whatever it can to facilitate the introduction of unified family courts throughout Ontario.

A unified family court system ideally would have a number of advantages over the three-tiered court system we presently have for family law disputes:

a. Jurisdictional questions would no longer require the time of both lawyers and judges. Consequently, cases would be processed more efficiently through the courts at a cost saving to both clients and taxpayers.

b. Enforcement proceedings in one court would not have to be stayed pending the resolution of variation proceedings in another court.

c. The legal profession and the public would have a greater understanding of court practices and proceedings in family law matters in that all such matters would be handled according to one set of rules.

d. The legal problems facing a family involved in marriage breakdown could be dealt with during the same proceedings and by the same judge. This could result in a better over-all resolution of the family's legal difficulties.

e. It would be easier to ensure the appointment of a family law bench that had knowledge, experience and special interest in family law matters. Furthermore, there would be greater likelihood of a consistent approach to family law cases than presently exists if there was one identifiable bench of judges that hears cases exclusively in this field. At the present time, judges of Provincial Court (Family Division) hear only family law cases, whereas judges at the County, District and Supreme Court levels hear cases involving all areas of law.

f. It would be easier to integrate non-legal services into the legal system for the benefit of family law clients if there was one specified court dealing with all family law cases. At the present time in most Ontario counties there may be one set of services offered at the Provincial Court (Family Division), and quite a different set of services offered at the other levels of court. This is not a particularly rational approach to the treatment of family law cases.

It must be acknowledged that the Council's endorsement of a unified family court system in Ontario is based on a theoretical analysis of the advantages this type of system should have over the present system. The Council has not had the benefit of any review of the present operation of the Unified Family Court in the judicial district of Hamilton-Wentworth and therefore cannot comment on whether it has lived up to the expectations expressed above.

The Council also acknowledges there are a number of constitutional and perhaps political issues to be resolved before a unified family court system could be introduced province-wide. One of the major difficulties is the appointment of judges who would have the jurisdiction to hear all family law matters. Under constitutional law, provincially-appointed judges are not able to grant divorces, nor are they able to make decisions affecting property rights. For a unified family court to be effective, its judges must be able to grant all forms of relief relevant to family law matters.

The Council realizes that a resolution of this issue and of other issues concerning the establishment of a unified family court cannot be achieved through any unilateral action on the part of the provincial government. Without doubt, the full cooperation of the federal government will be required. The Council therefore urges

the provincial government to initiate consultations with the Department of Justice in Ottawa with a view to establishing a province-wide unified family court system in Ontario.

LEGAL AID

In its consultations with women's organizations and family law experts, the Council was constantly reminded that although the law in a theoretical sense may provide protection for women both at the time of marriage breakdown and subsequent to marriage breakdown, for practical reasons some women are not able to take advantage of the law. One major difficulty facing women is that as full-time mothers or homemakers, or even as workers in low-paying, temporary or part-time jobs, they often do not have the funds to pay for legal advice or services. Many are therefore placed in the position of having to seek legal aid.

The Council wishes to commend both the government and the legal profession for their generosity to date in supporting the Ontario Legal Aid Plan. The Council recognizes this plan goes a long way to meet the needs of economically disadvantaged people in Ontario, but it must express its concern that the legal needs of many women in our society resulting from marriage breakdown are still not being met.

The Council was advised that in many municipalities legal aid is not given a spouse who wishes to obtain either spousal or child support through an application to Provincial Court (Family Division). That spouse must rely on whatever court services are available or on the cursory involvement of whatever duty counsel is present at the

Court House to process his or her claim. Similarly, in many municipalities legal aid is not given a spouse who must enforce a support order through Provincial Court (Family Division). The Council feels that these restrictions on the use of legal aid funds result in inadequate legal services being provided to many Ontario women. A review of the policies in different areas regarding the provision of legal aid for various family law matters should be conducted by the Ontario Legal Aid Plan to assess first if legal aid is being denied for problems that really require the services of a lawyer; and second if the availability of legal aid for family law matters differs from area to area.

The Council was also advised that in many northern or rural areas in the province, many lawyers are reluctant to take legal aid clients. It is well known that most lawyers in the province believe the legal aid tariff is too low. They argue that legal aid work is much less remunerative than work for paying clients. In many circumstances, the amount they receive under the Legal Aid Plan barely covers their overhead. In the larger municipalities, there appears to be enough competition among lawyers so that legally-aided clients can find lawyers to serve them. In the remoter areas of the province, however, lawyers can apparently have busy practices without resorting to legal aid clients. Considering the loss in income they will experience by serving legally-aided rather than paying clients, many lawyers choose not to take legal aid cases at all.

The Council is very concerned that there are inadequate legal aid services in the remoter regions of our province to meet the demand in the area of family law. Furthermore, the Council fears that the burden of this inadequacy is borne disproportionately by women and children who may be in desperate need of financial support. The Council suggests that one way of making legal aid lawyers available to people in the north and in other rural areas of Ontario is to establish more community legal aid clinics, and it urges the government to give this option immediate consideration. A more long-range goal would be to improve the conditions of the legal aid plan itself, so that more lawyers in the province would be willing to do legal aid work.

PUBLIC EDUCATION

The Council believes there is in Ontario a general lack of awareness and lack of understanding of existing legislation relating to family law matters. While the Council acknowledges that the public has an obligation to maintain an interest in and to develop a knowledge of the laws that govern our daily lives, the Council also recognizes a responsibility on the part of the government to encourage and assist the public to a better understanding of our laws and legal system. Since family law has the potential for affecting every resident in the province and since its impact on a person's life is multi-dimensional, the Council believes the government has a special responsibility in this area to become actively involved in public education.

From the Council's discussions with many individuals and groups it is apparent that too many of our citizens become familiar with family law only when marriage breakdown is imminent or has already taken place. By then, the couple concerned has to accept the laws as they find them: they have no opportunity of organizing their affairs or of planning for the change in status so as to avoid results they may consider unfair.

The Attorney General's review of the Family Law Reform Act offers the government an excellent opportunity to carry out a public education program to make Ontario citizens better aware of existing legislation and the various options being proposed for change. While the Attorney General should be the initiator in this regard, his cabinet colleagues and in fact all members of the Legislature should use the media,

speaking engagements, newsletters and other forms of communication to bring about a better public understanding of family law.

The Council suggests that the following steps be taken to reach out to the public with relevant information:

a. Printed material should be distributed with every marriage licence issued in Ontario, outlining the Family Law Reform Act (and perhaps the Children's Law Reform Act and the Succession Law Reform Act). This material could draw the attention of the couple to the possibility of their entering into a marriage contract if they did not want certain provisions in the laws to be applicable to their relationship.

b. Religious leaders and others who solemnize marriages should be encouraged to discuss family law issues with all couples contemplating marriage. Those responsible for organizing marriage preparation courses should be encouraged to include family law as a topic for consideration.

c. The Ministry of Education, in co-operation with boards of education, should insist that family law be a vital component of Family Studies courses in secondary schools. Furthermore, Family Studies courses should be mandatory for all students in secondary schools. Information must be made available to students in this way so that they know their legal rights and responsibilities

before they take such serious steps as marriage and the assumption of parenting duties.

d. All Ontario universities should recognize Family Studies courses as full credit courses, under their admissions policies, where it is not being done at the present time.

e. The Provincial Secretary for Social Development, who is responsible for the Youth Secretariat and the Seniors Secretariat, should play a key role in co-ordinating information programs on family law for their client groups.

f. Existing audio-visual and printed materials prepared by the Ministry of the Attorney General to explain the Family Law Reform Act should be updated and made available to schools, women's groups, service clubs, volunteer agencies and other interested parties across the province.

FOOTNOTES

1. Leatherdale v. Leatherdale (1980), 14 R.F.L. (2d) 263 (Ont. S.C.)
2. Leatherdale v. Leatherdale (1980), 31 O.R. (2d) 141 (C.A.)
3. (1980), 19 R.F.L. (2d) 135 at 140
4. Leatherdale v. Leatherdale S.C.C. December 6th, 1982 Reasons for Judgment by the Chief Justice, pp. 8,9
5. Murdoch v. Murdoch, [1975] 1 S.C.R. 423
6. See for example the Ontario Law Reform Commission Report on Family Law Part IV Family Property Law 1974, pp. 17-47
7. Ibid, pp. 211-219
8. Ibid, p. 50
9. Ibid, p. 50
10. Ibid, p. 51
11. Ibid, p. 52
12. Ibid, p. 56
13. Ontario Status of Women Council Brief to the Government of Ontario Respecting Widow's Rights to Family Property August, 1980, p. 8
14. (1885), 13 S.C.R. 677 at 694
15. [1978] 2 S.C.R. 436
16. (1981), 19 R.F.L. (2d) 165 (S.C.C.)
17. Statistics Canada, Earnings of Men & Women, Cat. 13-577 Occasional - Dec. 1981
18. Statscan Labour Force Catalogue 72-011 monthly 1982
19. (1979), 10 R.F.L. (2d) 385 (Ont. Co. Ct.)
20. Ibid, p. 391
21. R.S.O. 1980, Chap. 68 as amended by 1982, Chap. 20
22. Standing Committee on Social Development First Report on Family Violence: "Wife Battering" November, 1982, pp. 27-28
23. Ibid, p.36
24. Ibid, pp. 5-6
25. R.S.O. 1980, Chap. 68 as amended by 1982, Chap. 20

SUMMARY OF RECOMMENDATIONS

Property Issues

A. Ontario should adopt a deferred community of property regime combined with co-ownership of the matrimonial home and some judicial discretion with respect to business assets and debts.

B. Property subject to the deferred community of property regime should include those assets acquired by the spouses during the operation of the partnership and the increase in the value of the assets owned by either spouse at the time of the marriage. Excluded from the property regime would be those assets acquired by gift, inheritance, trust or settlement.

The spouse with the greater value of assets in his or her name would pay an equalizing claim to the other spouse on marriage breakdown.

C. Judicial discretion should be retained to provide that business assets and debts not be shared if it would be grossly unfair or unconscionable to do so because of extraordinary circumstances.

D. Termination of the property regime should be by court application or by the death of one of the spouses.

The definition of "living separate and apart under one roof" should be given a wider meaning.

A surviving spouse should be entitled to an equal share of the community of property.

E. The matrimonial home should be jointly owned.

Control over the alienation of the matrimonial home should be strengthened by changing the notice requirement for third parties dealing with matrimonial homes to actual or constructive notice and by providing for the registration on title of notice that a property is a matrimonial home.

F. The doctrines of resulting trust and constructive trust should be used to redress any inequities that might result upon the breakdown of a common law relationship.

Support Issues

A. The legislation should provide more specific guidelines for the judiciary both in regard to entitlement to support and quantum of support.

Such guidelines would include a definition of self-sufficiency, statutory recognition of women's unequal access to employment and objectives to be achieved through support awards.

B. Bad conduct should be removed as a relevant consideration in regard to quantum of support as well as to entitlement to support.

C. Periodic support payments should be adjusted automatically on each anniversary date of the order to take into account variations in the cost of living over the previous year.

D. All support orders should be binding automatically on the estate of the payor spouse when made, unless the payor spouse persuades the court otherwise.

E. The required period of continuous cohabitation entitling a common law spouse to support should be reduced from five years to three years.

The requirement that a common law spouse bring an application for support within a year of separation should be deleted.

F. A wage attachment should be ordered automatically once a payor spouse falls into default.

Legislation should provide that no employer can discriminate against an employee merely because a wage attachment for support payments has been ordered.

Imprisonment and the threat of imprisonment should be used more often by the Courts to enforce the payment of support orders.

Legal costs should be awarded systematically in enforcement proceedings when the reason for default is unwillingness rather than inability to pay.

Possession of the Matrimonial Home

A. The paramount consideration in applications for exclusive possession of the matrimonial home should be the best interests of the children of the marriage.

B. There should be a simple, inexpensive and speedy procedure for applications for temporary exclusive possession of the matrimonial home.

On such applications consideration should be given to the physical and psychological well-being of each family member if both spouses are allowed to remain in the matrimonial home.

The Courts should be given the jurisdiction to allow a spouse who is no longer residing in the matrimonial home to take some of the contents of the matrimonial home to his or her new residence.

C. There should be increased funding for the establishment of emergency shelters for battered wives and their children particularly in rural areas of the province.

Domestic Contracts

The right of Ontario couples to enter into domestic contracts should be continued.

The Process in Family Law Disputes

A. Mediation should be made an option to litigation for the resolution of family disputes relating to property, support, custody and access.

B. A unified family court system should be established throughout Ontario.

Legal Aid

More community legal aid clinics should be established in rural and northern areas of the province.

Public Education

The Government of Ontario should undertake a public education program to promote a better public understanding of family law.